

Editor's note: Request for clarification denied by order dated Mar. 12, 1996.

ASHLEY CREEK PHOSPHATE CO.
JOHN D. ARCHER

IBLA 93-69, 93-252

Decided November 29, 1995

Appeals from decisions of the Rock Springs, Wyoming, District Manager, and the Diamond Mountain, Utah, Area Manager, Bureau of Land Management, approving assignment of phosphate slurry pipeline rights-of-way WYW-80276C and UTU-50812.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

In approving an application for the assignment of a right-of-way issued under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), BLM may add a condition requiring that a pipeline constructed on the right-of-way be operated as a common carrier.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

In approving an application for the assignment of a right-of-way issued under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), it is beyond BLM's authority to add provisions regarding rates to be charged for use of a pipeline that has been held to be a common carrier because that is a matter that has been delegated to the Interstate Commerce Commission.

John D. Archer, 120 IBLA 290, 297 n.11 (1991), clarified.

APPEARANCES: E. Craig Smay, Esq., Salt Lake City, Utah, for appellants; Denise A. Dragoo, Esq., and Stanford B. Owen, Esq., Salt Lake City, Utah, for FS Pipeline Limited; Leonard J. Lewis, Esq., and John W. Andrews, Esq., Salt Lake City, Utah, for Chevron Pipeline Co.; and Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Ashley Creek Phosphate Company (Ashley Creek) and John D. Archer have appealed from separate decisions of the Rock Springs, Wyoming, District Manager, and the Diamond Mountain, Utah, Area Manager, Bureau of Land Management (BLM), that approved assignments of phosphate slurry pipeline rights-of-way WYW-80276C and UTU-50812 from Chevron Pipeline Company (Chevron) to FS Pipeline Limited (FS). ^{1/} In approving the assignments,

^{1/} BLM's Rock Springs District Manager approved the assignment of right-of-way WYW-80276C by decision dated Oct. 15, 1992, and Archer's and Ashley Creek's appeal from that decision was docketed as IBLA 93-69. BLM's Diamond Mountain Area Manager approved the assignment of right-of-way UTU-50812 by decision dated Feb. 25, 1993, and the appeal from that decision was docketed as IBLA 93-252. These appeals were consolidated by order

BLM denied requests by appellants and the State of Utah that BLM require as a condition for approval of the assignments that FS operate the pipeline as a common carrier and a request by appellants that BLM impose a condition that the line only be allowed to operate while there was in force a tariff of rates approved by the Interstate Commerce Commission (ICC).

I. Factual and Procedural Background

The pipeline extends approximately 100 miles and carries phosphate in a slurry from Chevron's mines (now FS) near Vernal, Utah, to its fertilizer plant near Rock Springs, Wyoming. Archer is the president of Ashley Creek, and he and his company hold leases for phosphate deposits on land owned by the State of Utah and hold Federal prospecting permits for land in the Vernal Known Phosphate Leasing Area.

Even before these rights-of-way for the pipeline were issued to Chevron in April 1985, access to the pipeline was a matter of concern to appellants. By letter to BLM dated July 20, 1984, counsel for Archer referred to the possibility of joint construction of the pipeline in order to provide for transportation for phosphate from all viable deposits in the area and requested that BLM consider conditioning approval of the right-of-way applications "upon requirements that operators of nearby properties which may be benefitted by a pipeline be given reasonable

fn. 1 (continued)

dated Mar. 25, 1993. Ashley Creek's request in IBLA 93-69 that we refer the case for a hearing under 43 CFR 4.415 was denied by our order dated Mar. 2, 1993.

opportunity to participate in the line upon payment of an appropriate share of expenses." In response to an inquiry about this letter from BLM, Chevron stated it hoped that at a forthcoming meeting Archer would advise it whether he planned to develop his property and wanted to ship phosphate slurry through its pipeline, but that it did not plan to discuss joint ownership or construction of the pipeline with Archer. Chevron offered its opinion that BLM was not authorized to require joint construction of a pipeline to be installed on a right-of-way issued under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988), or to require that such a pipeline be operated as a common carrier. Chevron stated its understanding in its August 7, 1984, response that its pipeline would be subject to ICC regulation and that Archer would be able to ship his phosphate slurry under tariffs approved by that agency. By letter dated August 25, 1984, BLM relayed this understanding to Archer's counsel and stated it did not expect to condition the right-of-way as he had requested. Archer's counsel responded that Chevron had advised Archer that it intended to make its pipeline subject to ICC regulation and tariffs; he also raised concerns about the adequacy of pipeline capacity for shippers other than Chevron. The rights-of-way were issued with no mention of a common carrier requirement.

Chevron did not file a tariff with the ICC, so by letter dated July 9, 1987, Ashley Creek notified BLM that it had filed a complaint with the ICC to require Chevron to file a tariff and requested BLM "to advise the ICC

that the understanding under the right-of-way grant was that the pipeline would be a Common Carrier subject to regulation by the ICC and a tariff should be filed." In a letter to the ICC dated August 7, 1987, BLM's Utah State Director enclosed the July 20, 1984, and August 25, 1984, letters summarized in the preceding paragraph, stated BLM's understanding that "the pipeline is subject to ICC jurisdiction that would permit its use by other qualified parties under appropriate regulation," and added that because part of the pipeline was in a narrow canyon and in an environmentally sensitive area it was doubtful that BLM would grant a right-of-way for a second pipeline for the same general route.

In January 1989 the ICC ordered Chevron to establish rates and publish a tariff by May 1989 (vacating the initial decision by an Administrative Law Judge that determined Chevron did not have to file a tariff because Ashley Creek was not yet able to ship phosphate), and offered guidance on how the reasonableness of rates would be judged. Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C. 2d 303 (1989). The ICC took note of BLM's statement that it "desired to limit the number of pipelines through this environmentally sensitive area [and] therefore granted the right-of-way with the understanding that Chevron's pipeline would be operated as a common carrier subject to the jurisdiction of this Commission." Id. at 304 n.4. The ICC denied requests for damages and attorney's fees, noting that Ashley Creek acknowledged "it is not ready to ship phosphate rock and

has not suffered any direct damage." 2/ Although a tariff was published in 1989, the reasonableness of the rates remains a matter of controversy before the ICC.

When appellants became aware that Chevron planned to transfer the pipeline to FS, counsel for appellants wrote BLM a letter dated November 12, 1991, requesting notification of any proceedings concerning the assignment. In that letter appellants' counsel asserted that "the pipeline has been operated during its six-year lifetime as a private facility serving only the owner" and suggested that "[i]n order to avoid further circumvention of the common carrier requirement, it may be appropriate at [the] time [of approval of the assignment] to formalize the requirement of common carrier operation and to make specific provisions regarding rates." In a letter to BLM dated November 18, 1991, the Director of the Division of State Lands and Forestry of Utah's Department of Natural Resources stated similar views and requested "that the BLM specifically condition the approval of the assignment upon the pipeline's operation as a common carrier pursuant to ICC tariff orders and regulations."

BLM's Rock Springs District Manager responded to Utah's Division of State Lands Director by letter dated December 9, 1991, stating:

2/ "Ashley Creek has not developed its mineral rights because, it contends, it has been unable to obtain specific information about the rates it would have to pay to transport its potential phosphate traffic. Ashley Creek thinks that its phosphate can be transported most efficiently by pipeline and wants Chevron to publish a tariff for phosphate shipments so that it can determine whether it would be economically practical to develop its phosphate holdings." Id.

Unfortunately, * * * we are directed by BLM Manual 2801.42F2c to " * * * not impose additional terms and conditions upon an assignee (except to add or modify bonding requirements) as there is no provision in 43 CFR 2803.6-3 to allow for this." A common carrier stipulation could be made a condition of approval of an assignment only with the assignee's consent. We cannot arbitrarily diminish the rights granted in the existing right-of-way.

Counsel for appellants was provided a copy of BLM's letter and responded on December 13, 1991, that BLM did "not have to add a condition to the Chevron right-of-way requiring operation of the line as a common carrier" because "[t]hat omission [by BLM] has now been corrected by the I.C.C., and the condition now attaches as a matter of law." (Emphasis in original.) By memorandum dated December 23, 1991, the District Manager requested an opinion from the Regional Solicitor on BLM's position that it could not condition assignment of a right-of-way with a common carrier stipulation without the consent of the assignor and assignee and that a common carrier provision was imposed on right-of-way WYW-80276C by the ICC and enforcement of that requirement was solely within the ICC's jurisdiction, not BLM's.

In a decision dated March 12, 1992, the ICC ordered use of a "hybrid ratemaking model" to compute rates, referred the case to an Administrative Law Judge for discovery proceedings, and reserved initial decisionmaking authority to itself in order to "expedite resolution of this already protracted proceeding." Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., No. 40131 (Sub-No.1) (Mar. 12, 1992) at 5, 14-15. ^{3/} The ICC discussed

^{3/} The Commission remarked that the "intransigence and contentiousness of the parties here do not seem to offer much hope for the type of negotiated settlement of rate disputes often reached before or during the initial decision stage of a proceeding." Id. at 6.

Ashley Creek's contention that "its ability to participate in the market is dependent upon its receiving favorable differentially priced rates set at a level low enough to permit it to enter the phosphate market," id. at 9, but concluded that no provision would be made for differential pricing, id. at 12, and that "there is no justification for setting preferential 'entry' rates for [Ashley Creek]." Id. at 13.

On April 17, 1992, FS acquired the pipeline from Chevron. On April 23 and May 20, 1992, FS filed its applications for assignment of the rights-of-way with the Rock Springs and Vernal District Offices, BLM. On April 27, 1992, FS filed a notice with the ICC adopting Chevron's tariff. In June 1992 Ashley Creek filed a complaint against FS with the ICC alleging unreasonable, unlawful and discriminatory rates and terms for shipment of phosphate slurry through the pipeline.

On July 24, 1992, the Assistant Regional Solicitor responded to BLM's December 1991 request for an opinion. He did not rely on the BLM Manual or 43 CFR 2803.6-3 as a basis for denying appellants' request. Rather, he characterized approval of an assignment as a discretionary act, so that BLM has authority to impose additional conditions if it is in the public interest to do so. "Accordingly," he stated, "the relevant question is not whether the BLM can impose a stipulation requiring the assignee of the subject right-of-way to operate it as a common carrier but whether it is reasonable or necessary to do so." Based on a statement in a footnote in our decision in John D. Archer, 120 IBLA 290, 297 n.11 (1991), and Chapman v.

El Paso Natural Gas Co., 204 F.2d 46, 51 (D.C. Cir. 1953), cited in that footnote, the Assistant Regional Solicitor stated BLM would not have jurisdiction to enforce a condition that the pipeline be operated as a common carrier – only the ICC would. For this reason he concluded it was not reasonable or necessary for BLM to require the assignee of a right-of-way to agree to operate a pipeline constructed on it as a common carrier.

On July 28, 1992, BLM convened a meeting in Rock Springs to discuss the assignment of the Chevron right-of-way that was attended by Archer and representatives of Ashley Creek, BLM, Chevron, FS, and the State of Utah. The record includes a transcript of what was said at that meeting, as well as the written comments filed with BLM afterwards by Ashley Creek, FS, and Chevron. At the meeting, counsel for appellants stated: "I think the appropriate condition [is] one which says operate the pipeline as long as there is in place a tariff of rates, and it is approved by the ICC; otherwise it is not operated" (Tr. 13; see also Tr. 21, 32, and Letter of July 31, 1992, from E. Craig Smay, Esq., to Rock Springs District Office at 8).

II. BLM's October 15, 1992, Decision

In the October 15, 1992, decision under appeal, the Rock Springs District Manager provided three bases for denying appellants' requests. 4/

4/ No additional reasons were provided in the Feb. 25, 1993, decision of the Diamond Mountain Area Manager.

First, he stated that although 43 CFR 2803.6-3 provides that BLM may modify or add bonding requirements when approving an assignment it does not provide for adding any other requirements. He quoted BLM Manual 2801.42F.2.c. (Rel. 2-270, dated 11/6/90): "[T]he authorized officer may not impose additional terms and conditions [additional to those in the right-of-way grant to be assigned] upon the assignee (except to add or modify bonding requirements) as there is no provision in 43 CFR 2803.6-3 to allow for this."

Second, he referred to our decision in John D. Archer, *supra*. ^{5/} In that case we stated that BLM has authority to require operation of a pipeline as a common carrier, 120 IBLA at 297-98, but affirmed a BLM decision not to impose a common carrier requirement upon issuance of a phosphate slurry pipeline right-of-way when there was no statute requiring such operation and no demonstration that such a condition was "necessary to protect competition, future development of phosphate reserves, or the environment." 120 IBLA at 300. The District Manager stated that a re-examination of the environmental documents prepared in connection with the original application for the right-of-way in light of our decision in Archer, as well as a review of the information submitted by all parties concerned with the assignment, revealed no reason to modify the assignment based on environmental considerations.

^{5/} Our decision was appealed, Archer v. Lujan, Civ. No. 91-0472-E-EJL (D. Idaho). On Sept. 30, 1993, U.S. Magistrate Judge Boyle issued a Report and Recommendation that Defendants' Motion for Summary Judgment be granted. On Apr. 1, 1994, U.S. District Judge Lodge issued an Order Adopting the Report and Recommendation. An appeal from this order has been filed, No. 94-35514 (9th Cir. Apr. 18, 1994).

Third, he stated that "decisions regarding the operation of a common carrier pipeline, as distinguished from its physical aspects, are not within the jurisdiction of the BLM," citing Chapman v. El Paso Natural Gas Co., *supra*, and concluded that "any assignment of the right-of-way would be subject to ICC ruling 5 I.C.C. 2d 303 (1989) and the lack of a specific common carrier stipulation in the assignment * * * will not change the legal rights and obligations of the assignor, the assignee, or the BLM."

"Therefore," the District Manager concluded:

[T]he requests of the State of Utah and Ashley Creek Phosphate Company to condition approval of the assignment of right-of-way upon the pipeline's operation as a common carrier pursuant to ICC tariff orders and regulations or impose a condition on the right-of-way assignment that the line only be allowed to operate while there is in force a tariff of rates approved by the ICC is [sic] denied.

III. Arguments on Appeal

In their statement of reasons for appeal (SOR) of BLM's October 15 decision appellants observe that section 501 of FLPMA, 43 U.S.C. § 1761 (1988), provides that BLM shall require an applicant for a right-of-way to submit information relating to the use of the right-of-way, "including its effect on competition," necessary for a determination whether to grant the right-of-way and the terms and conditions that should be included. Section 505, 43 U.S.C. § 1765 (1988), "requires the Secretary to attach to each right-of-way grant terms and conditions necessary or appropriate to carry out the provisions of FLPMA, which include protecting the value of

public resources and preventing anti-competitive use of the public lands," appellants assert, and section 1764(e) requires the Secretary to publish regulations adequate to assure enforcement of these terms and conditions (SOR at 6).

Appellants continue:

Where BLM is presented an application for right-of-way which reveals on its face that a pipeline is proposed to provide practical access to market for a part only of a large phosphate field containing substantial State and federal lands, and which otherwise entirely lacks access to market, it would seem automatic under these statutes that the Secretary require the applicant to identify the other owners in the field, to notify other owners, and to solicit their comments regarding effects upon competition. Certainly, this must be so where BLM takes the position that no other such pipeline providing connection to the local rail lines will ever be permitted. If it appears that there will be anti-competitive [e]ffects to granting a private monopoly to the only practical access to market for a large phosphate field containing public and private lands, it seems clear that the Secretary is required to take effective steps to prevent such effects, including, where appropriate, the imposition of some form of common carriage requirements, and regulations adequate to enforce them.

(SOR at 6). Rather than exercising its statutory power and fulfilling its statutory obligation to impose conditions and regulations upon the right-of-way grant that would avoid anticompetitive effects, BLM simply assured appellants that Chevron would operate the pipeline as a common carrier. Id. at 7. Chevron did not do so, however, from the opening of the pipeline in 1986 until ordered to do so by the ICC, and since then "Chevron has chosen to maximize costs and barriers to common use of the largely empty pipeline." Id. at 8. In these circumstances, appellants ask

considering the time required for the ICC to act, that it is the statutory duty of the BLM, not the ICC, to protect the public lands, that an action for damages for violation of the antitrust laws is lengthy and expensive, and does not cure the damage to the public interest caused by monopolistic behavior, and that imposing the costs of enforcement of FLPMA upon Chevron's private competitors is necessarily anti-competitive, is it appropriate for the BLM, where faced with a request to transfer the right-of-way, to anthologize excuses for not exercising jurisdiction? [Emphasis in original.]

Id. at 10.

Appellants argue BLM has the power to act. Chapman, supra, was a decision under the Mineral Leasing Act, not FLPMA, and FLPMA "contains provisions which not only allow, but appear to specifically require the Secretary to regulate in ways forbidden by Chapman." Id. at 11. Under FLPMA, the Secretary

may impose any condition, or variation of any condition, which he deems appropriate to the purpose. * * * There appears no reason, for example, under these provisions, why the Secretary could not require that pipeline rates be levelized to promote access by competitors. There appears no reason why the Secretary could not consider termination, where he deemed the documented representations made to obtain the right-of-way to have proven false. [Emphasis in original.]

Id. at 12-13. BLM's decision, appellants argue, "is that there is no further action it can take, except to await action by the ICC, in the hope that Chevron's competition will have the resources to force compliance some day." Id. at 13.

In appellants' view, BLM's reliance on 43 CFR 2803.6-3 amounts to saying that, "having been tricked at the time of approval into omitting appropriate conditions to prevent violation of the Act, BLM now holds itself powerless to prevent continued violation of the Act." Id. at 14. Under section 506 of FLPMA, however, a right-of-way may be suspended or terminated for "noncompliance with any provision of this subchapter," including the requirement in section 501 that information be provided concerning the effect of the use of the right-of-way on competition.

When Chevron assured the BLM * * * that the Chevron pipeline would offer the State's lessees the opportunity to ship in the pipeline at rates regulated by the ICC, Chevron knew that * * * it was Chevron's intention to take the position with respect to Mr. Archer that it would not publish a tariff * * *. [Emphasis in original.]

Id. at 15.

Even had Chevron believed, as it later unsuccessfully alleged, that an obscure exemption to the provisions of the Interstate Commerce Act might allow it not to publish a tariff, it concealed its intentions in that regard. * * * Chevron's deceptive behavior constituted substantial non-compliance with FLPMA. Its operation of the pipeline without a tariff from 1986 to 1989 constituted substantial non-compliance with the ICA [Interstate Commerce Act]. On either ground, the right-of-way was subject to suspension or termination. In short, BLM, upon Chevron's application to assign the right-of-way, was entitled to insist that Chevron accept the condition, for example, of operating the pipeline only under a tariff approved by the BLM or the ICC, or suspending operations.

Id. at 15-16.

It was of the utmost importance that BLM do so, in order to re-assert jurisdiction over this pipeline to protect the public lands. In the face of compelling evidence of anti-competitive use of the pipeline, BLM has left itself in the appalling position of being unable to enforce FLPMA, while hoping that the private parties may yet survive Chevron's war of attrition before the ICC. Meanwhile, the promise of common access remains unfulfilled, the pipeline continues to run two-thirds empty, and the thoroughly anti-competitive imposition of enforcement costs upon Chevron's competitors goes on unabated. The State and federal phosphate lands in northeast Utah have been rendered valueless because the only access to market has become a private monopoly.

Id. at 18. Appellants urge that BLM's decision be reversed, "and BLM ordered to conduct an appropriate investigation into, and to approve, appropriate conditions and regulations to prevent further anti-competitive use of the public lands." Id.

FS answers that it has satisfied the regulatory requirements for approval of an assignment and that those regulations do not authorize BLM to add a common carrier stipulation upon assignment (Answer at 6-7). FS asserts that the appeal should be dismissed as untimely because appellants should have appealed this matter in 1985 when the right-of-way was issued with no common carrier stipulation. Id. at 7-8. Assuming BLM has discretionary authority to impose a common carrier stipulation when approving the assignment of a right-of-way, FS argues that BLM "correctly deferred to the ICC to make tariff determinations regarding matters currently pending before the ICC * * * [r]ather than establishing a separate record before BLM regarding the rates, terms and conditions for transporting phosphate slurry through a common carrier pipeline." Id. at 10, 13. Under

the Interstate Commerce Act (ICA), the burden of proving the unlawfulness of the existing rate rests upon the party challenging it. Id. at 13, citing Central of Georgia Railroad Co. v. United States, 379 F. Supp. 976, 978 (D.D.C. 1974). "BLM does not have the jurisdiction or expertise to approve tariff rates as suggested by Ashley Creek." Id. at 16.

FS asserts:

The relief which Ashley Creek has requested would stop [FS]'s use of the right of way, halting the transportation of phosphate through the pipeline * * *. [A]s a result of shutting down the pipeline, both the mine and the plant would close, forcing employees out of work and creating adverse impacts on state and local economies, as well as impacting the national market supply of phosphate.

Id. at 10; Affidavit of James M. Williams at 4-6.

BLM answers that it does not have jurisdiction to adjudicate disputes over the need for or the fairness of tariffs for common carrier pipelines (Answer at 3). BLM states there is no evidence that anyone owning deposits of phosphates that could be shipped via the pipeline had developed a mine in 1982, when Chevron filed its application for the right-of-way, or has developed one since. BLM agrees that Title V of FLPMA authorizes it to require that pipelines constructed on rights-of-way granted under Title V be operated as common carriers, and adds that the legislative history of section 501 of FLPMA states that provision was designed to enable the Secretary "to make decisions and determine terms and conditions which will

foster competition among producers and distributors." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 20 (1976). However, "[t]he Secretary's mandate to foster competition and his authority to require a pipeline constructed on a Title V right-of-way to operate as a common carrier do not give him the authority to regulate the operation of the pipeline," BLM states (Answer at 13 citing note 11 of Archer and Chapman, *supra*). Nothing in FLPMA indicates Congress intended to transfer to the Secretary of the Interior jurisdiction granted the ICC earlier under the ICA over pipelines transporting a commodity other than water, gas or oil in interstate commerce or to "grant him concurrent jurisdiction over the operation of common carrier pipelines together with the duty to develop the programs and procedures necessary to supervise the operation of such pipelines, including the adjudication of disputes over rates and tariffs." Id. at 14-15. As a result of the ruling by the ICC in Ashley Creek, 5 I.C.C. 2d 303, *supra*, the question whether the Secretary may condition the approval of the assignment on acceptance of a stipulation that the pipeline be operated as a common carrier is moot, BLM states. Id. at 17. Tariffs have been published, BLM observes. "The dispute between the appellants and [FS] is whether the tariffs are reasonable. Such disputes are within the exclusive jurisdiction of the ICC." Id. at 16. Further, engaging in a dispute with appellants over whether a tariff is required or is reasonable is not evidence of Chevron's or FS' failure to comply with applicable laws or regulations that would justify invoking BLM's authority to suspend or terminate the right-of way. Id. at 17. "Final action by the ICC, including, if

sought, judicial review of any ICC decision, would be required before the BLM could initiate any action to suspend or terminate the right-of-way upon which the pipeline is constructed based upon failure to operate the pipeline as a common carrier," BLM argues. Id. at 18. However, appellants have adequate remedies: "The ICC and Federal courts provide forums for resolving disputes over the operation of the subject pipeline." Id.

In their SOR for appealing the February 25, 1993, decision of the Diamond Mountain Area Manager's decision, see note 1, supra, appellants argue that the "pipeline has been operated in violation of the [ICA]," that the violation was finally determined by the ICC in Ashley Creek, supra, and that under the circumstances "BLM was required to reject the request to transfer the right-of-way, to cancel of the right-of-way instead, and to reissue it only upon the conditions originally sought," i.e., conditions which protect competition (SOR at 2, 5). Appellants add BLM is obligated not to withhold the means for the State of Utah to maximize returns from its school trust lands. This means BLM "must provide these lands reasonable access to market over intervening federal lands," and if BLM continues to allow exclusive use of this right-of-way it may have to grant an application from appellants for a second right-of-way, even if that would have adverse environmental effects. Id. at 13. Finally, appellants argue that

the concern that 'shutting down the pipeline' will put people out of work is apocryphal. * * * An order to FS to sell to appellant the excess capacity in the pipeline for the price FS paid to Chevron would not require closing the pipeline for an hour.

It would have no adverse [e]ffect on local employment, and could have the beneficial effect of allowing appellant to establish a competing business.

Id. at 14-15.

To appellants' final argument, FS responds that nothing in FLPMA mandates that BLM impose stipulations regarding excess pipeline capacity and if BLM were to require FS to lease or sell excess capacity to appellants it would impermissibly interfere in the operation of the pipeline. The ICC, not BLM, has the jurisdiction and the expertise to allocate any excess pipeline capacity, FS argues.

IV. Discussion

[1] We begin by considering whether BLM has authority to impose a common carrier stipulation as a condition of approving the request for assignment of a right-of-way. 43 U.S.C. § 1761(b)(1) (1988) authorizes the Secretary to require the submission of information necessary for "a determination * * * as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included." 43 U.S.C. § 1764(b) (1988) provides that a right-of-way be limited to a reasonable term, in light of all circumstances. For long-term projects such as this one, the Senate stated, "there should be a provision for review and revision of the terms and conditions of the right-of-way needed to reflect

changing times and conditions." S. Rep. No. 583, 94th Cong., 1st Sess. 71 (1975). 43 U.S.C. § 1765 (1988) sets forth the terms and conditions that must be and may be included in a right-of-way. ^{6/}

These terms and conditions may also be imposed or changed when a right-of-way is assigned. The rights granted in a right-of-way are neither permanent nor absolute, and BLM must have discretion to manage the public lands in light of changing circumstances. Shell Pipe Line Corp., 69 IBLA 103, 105-06 (1982). The concerns that Congress requires and authorizes BLM to consider when issuing a right-of-way would be effectively negated if BLM were precluded from considering whether those same concerns would be satisfied when the right-of-way is assigned.

^{6/} Section 505 of FLPMA, 43 U.S.C. § 1765 (1988), provides that each right-of-way:

"[S]hall contain (a) terms and conditions which will (i) carry out the purposes of the Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and (b) such terms and conditions as the Secretary * * * deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."

Before it was amended in 1987, Departmental regulation 43 CFR 2803.6-3 required the assignee to provide a stipulation "to comply with and be bound by the terms and conditions of the grant to be assigned plus any additional terms and conditions and any special stipulations that the authorized officer may impose (emphasis added)." The underscored language was deleted

and the following new sentence was added to the regulation: "The authorized officer may, at the time of approval of the assignment, modify or

add bonding requirements." 52 FR 25820 (July 8, 1987). The rationale

for this change was that "[r]ight-of-way grants are freely assignable

and should not be encumbered with limitations in the absence of convincing reasons." 52 FR at 25816 (July 8, 1987).

The amendment of this regulation cannot and does not abdicate BLM's statutory authority under Title V of FLPMA. The language of the amended regulation does not preclude imposing additional conditions, and the preamble to the regulation indicates they may be imposed when there are convincing reasons. However, as stated above, the BLM Manual provides that "the authorized officer may not impose additional terms and conditions upon the assignee (except to add or modify bonding requirements) as there is no provision in 43 CFR 2803.6-3 to allow for this." BLM Manual provisions, although binding on BLM employees, are not codified regulations having the force and effect of law and therefore do not necessarily govern our disposition of this matter. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 I.D. 262, 279 (1982); see Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). Although we normally

uphold the application of agency-wide procedures that are reasonable and consistent with the law, Beard Oil Co., 105 IBLA 285, 288 (1988), we do not follow them when they are inconsistent with the relevant regulation. Atlantic Richfield Co., 121 IBLA 373, 380, 98 I.D. 429, 432-33 (1991); Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981). Thus, if approval of an assignment would perpetuate a failure on the part of this Department to fulfill its statutory responsibilities, the Department has authority to take appropriate corrective action at the time of assignment. The regulation simply evinces BLM's current policy that this authority will be exercised only when there are convincing reasons.

We believe there is a convincing reason in this case, and that reason relates to an important distinction between the facts in this case and those in John D. Archer, *supra*. In Archer "[t]he condition of the environment in the project area [was] not so sensitive that introduction of another pipeline would be precluded," 120 IBLA at 300, while in this case, as BLM's Utah State Director observed in his August 7, 1987, letter to the ICC, because part of the pipeline is in a narrow canyon and in an environmentally sensitive area it is doubtful that BLM would grant a right-of-way for a second pipeline for the same general route.

As noted above, the District Manager's decision recites that he reviewed the information submitted by the parties involved in the assignment of the right-of-way and re-examined the environmental documents originally prepared for the pipeline in light of Archer and saw "no reason

to modify the assignment based on environmental considerations." We cannot square this conclusion with the Utah State Director's August 7, 1987, statement to the ICC, or with our review of the environmental documents. 7/

In Archer we said that BLM "could require operation of [the] pipeline as a common carrier in order to protect the environment." 120 IBLA at 298. In our view, avoiding the repetition of these environmental impacts from another pipeline is a convincing reason why it would have been appropriate for BLM to condition the assignment of the right-of-way on a common carrier stipulation, and such a condition would not "arbitrarily diminish the rights granted in the existing right-of-way," as the District Manager phrased it in his December 9, 1991, letter to the State of Utah Director of the Division of State Lands and Forestry.

Further, although the District Manager correctly paraphrased our holding in Archer in his decision – i.e., that BLM properly declined to

7/ Chevron Phosphate Project, Draft Environmental Impact Statement, January 1983, Chapter 4, Environmental Consequences, Section 4.6, Phosphate Slurry Pipeline Alternatives, pages 4-50 through 4-58. The pipeline route passes through Jesse Ewing Canyon. Impacts on soils and vegetation, for example, were described as follows in the Draft EIS:

"Pipeline construction in Jesse Ewing Canyon * * * would occur in the narrow floodplain. Areas with slopes greater than 15 percent would require contour alignment adjustments, causing extensive sidehill cuts in the steep and very steep, hard bedrock sideslopes. Since the narrow canyon area currently contains a county road and the existing MAPCO pipeline, extreme care would be required to avoid impacts to these facilities and would restrict the alternative slurry pipeline alignment. Extensive amounts of hard bedrock would require blasting and removal to facilitate location of the pipeline."

(Draft EIS at 4-54). See also Chevron Phosphate Project, Final Environmental Impact Statement, July 1983, Section 2.2.4, Comparative Analysis - Phosphate Slurry Pipeline Alternatives (especially discussion of impacts on transportation networks, page 2-7); Chevron Phosphate Project, Record of Decision, Sept. 22, 1983, Management Considerations, pages 10-11.

condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration that such a condition was "necessary to protect competition, future development of phosphate reserves, or the environment," 120 IBLA at 300 – he did not address in even a conclusory manner whether such a condition was necessary to protect either competition or future development of phosphate reserves. Either of those concerns would support requiring operation of the pipeline as a common carrier, and both of them warranted examination and discussion.

We therefore conclude that in approving the assignments in this case a condition requiring operation of the pipeline as a common carrier would not be precluded by 43 CFR 2803.6-3 or the BLM Manual.

In our view, imposition of such a stipulation would have been appropriate under the circumstances of this case but for the ICC's decision in January 1989. However, as the District Manager stated in his decision,

any assignment of the right-of-way would be subject to ICC ruling 5 I.C.C. 2d 303 (1989) and the lack of a specific common carrier stipulation in the assignment of the Chevron Pipeline Company right-of-way will not change the legal rights and obligations of the assignor, the assignee, or the BLM.

Counsel for appellants acknowledged as much in his letter of December 13, 1991, when he wrote that BLM did

not have to add a condition to the Chevron right-of-way requiring operation of the line as a common carrier. That legal requirement should have been specifically recognized when the right-of-way issued. That omission has now been corrected by the I.C.C., and the condition now attaches as a matter of law. [Emphasis in original.]

Presumably, it is because appellants recognized that the imposition of a common carrier condition was moot that they requested the relief they did, namely, in approving the assignment "to formalize the requirement of common carrier operation and to make specific provisions regarding rates," letter of E. Craig Smay, Esq., to BLM dated November 12, 1991, at 2 (emphasis supplied), and "that the line only be operated while there is in force a tariff of rates approved by the I.C.C." (Letter from E. Craig Smay, Esq., to BLM dated July 31, 1992, at 8 (emphasis in original)).

[2] This brings us to BLM's reliance on footnote 11 in our decision in Archer, supra, Chapman v. El Paso Natural Gas Co., supra, and the opinion of the Assistant Solicitor based on those cases. In Archer, supra at 297 n.11, we stated:

The precise manner of Simplot's operation of its pipeline as a common carrier is, however, outside the jurisdiction of this Department. Indeed, in Chapman v. El Paso Natural Gas Co., supra at 51, the court concluded that, even where section 28(r) of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(r) (1988), expressly requires oil and gas pipelines to be operated as common carriers, the Secretary does not have the authority to prescribe the manner of operation as a common carrier. It is equally clear that, in the case of FLPMA rights-of-way where the statute makes no express provision for operation as a common carrier, the Secretary is similarly not authorized. [Emphasis added.]

Appellants regard this note as "certainly incorrect." The note, they say

appears to take the position that if the Secretary, under the Mineral Leasing Act, has no authority to regulate operations of a pipeline where he is required to make it a common carrier, he has no such authority under FLPMA, which merely allows him to make it a common carrier. It hardly follows, however, that the Secretary's discretion must be greater where Congress specifies that subject pipelines must be common carriers, than where Congress gives the Secretary authority to impose such conditions as he deems appropriate to protect competition and to enforce them by such regulations as he sees fit. [Emphasis in original.]

(SOR at 13 n.1). Appellants refer to the decision in Utah Power & Light Co. v. Morton, 504 F.2d 728, 736 (9th Cir. 1974), which, they argue, indicates the inapplicability of Chapman to other rights-of-way under Title 43 of the United States Code.

In Chapman, the court ordered the Department to issue rights-of-way for a natural gas pipeline under 30 U.S.C. § 185 (1950) without additional stipulations imposed by the Department under which it would undertake to review pipeline rates. The Department had originally imposed a stipulation that only required the pipeline to operate as a common carrier and to file a tariff with the appropriate regulatory agency – in that case, the Federal Power Commission (FPC) – within 30 days. Id. at 48 n.1. When all but a very small portion of the line had been built, the Department sought to impose extensive new stipulations that required the right-of-way holder upon request to submit to the Secretary a rate schedule or tariff and revise it if the Secretary determined that it was not consistent with the

obligation to operate as a common carrier and to enlarge the line if the capacity was not sufficient when a request for transportation was made. Id. at 48-50 nn.3, 4. In ordering issuance of the rights-of-way without the new stipulations, the court stated:

The language of section 28 [30 U.S.C. § 185 (1950)] clearly gives the Secretary authority to provide regulations and conditions as to survey, location, application, and use, but we read that to pertain to the physical aspects of the rights-of-way and not to the operation of the pipe line. Without more than the requirement that a condition be imposed that pipe lines be "constructed, operated, and maintained as common carriers", we do not regard the statute as conferring upon the Secretary authority to exercise so vast and so detailed a power * * * as attempted in the proposed stipulations * * *.

Id. at 51. A significant factor in the court's opinion was that the company had already expended "considerable funds * * * in justifiable reliance upon the earlier ruling," id. at 54, so that the Secretary's duty was only ministerial, having exhausted the scope of his discretion with issuance of the first stipulation. Id. at 53-54.

In Utah Power & Light Co. v. Morton, supra at 728, aff'g Utah Power & Light Co., 4 IBLA 62 (1971), the court upheld the Department's authority to condition issuance of a right-of-way on compliance with a regulation requiring a private utility to permit use of the excess capacity of its transmission lines erected on the right-of-way by the Federal Government, a practice known as "wheeling." The Utah Power right-of-way was issued under the Act of February 15, 1901, ch. 372, 31 Stat. 790, as amended

March 4, 1911, ch. 238, 36 Stat. 1253, formerly codified at 43 U.S.C. §§ 959, 961 (1970). The court rejected Utah Power's argument that the Federal Power Act "pre-empts any authority given to the Secretary by the 1911 right-of-way statute * * * to regulate the transmission and sale of electricity," 504 F.2d at 732, finding that the Federal Power Act did not confer jurisdiction on the FPC to license non-primary transmission lines of the kind involved or to regulate public lands, id. at 733-34, and that the Secretary's regulation was within the authority granted by the 1911 statute to condition grants of rights-of-way in a manner serving the public interest by means of general regulations. Id. at 735. The court also rejected Utah Power's argument, based on Chapman, that the Secretary was regulating the operations of a power company by conditioning the right-of-way for purposes unrelated to the right-of-way statute. The court noted that the Mineral Leasing Act involved in Chapman "expressly provided a built-in protection of the public interest" in the provision of section 28 for forfeiture of the grant for failure to comply with the provisions of the section or with appropriate regulations and conditions established by the Secretary, whereas the 1911 right-of-way act did not contain such a protection but instead authorized the Secretary to protect the public interest via regulations. 504 F.2d at 738. The court also noted that Chapman was concerned with a license previously issued without condition and a later attempt to alter the license, while Utah Power was dealing with attaching a condition to a license prior to issuance, id. at 739, a distinction also made in the Department's decision upholding a similar regulation upon which

the court relied. See Southern California Edison Co., 71 I.D. 405, 412 n.17 (1964).

BLM points out this latter distinction between Utah Power and this case, and adds that "[u]nlike the statute involved in Utah Power, Title V of FLPMA provides for the protection of the public interest" (Answer at 15). That is, just as section 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1952), in Chapman provided that "[f]ailure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary * * * shall be ground for forfeiture of the grant * * * in an appropriate proceeding," so section 506 of FLPMA, 43 U.S.C. § 1766 (1988), provides that noncompliance with Title V or condition of a right-of-way or applicable rule may be grounds for suspension or termination of the right-of-way.

Although it is an important factor, we are less concerned in this case with whether BLM may impose a common carrier stipulation at the time of assignment of a right-of-way, rather than when the right-of-way was originally issued, than the Chapman court was. As we said above, BLM is authorized to add or change conditions to a right-of-way if it finds it originally overlooked a concern set forth in 43 U.S.C. § 1765 (1988) or that circumstances have changed in a way that such a concern has emerged since the right-of-way was granted. Whether it is reasonable to add

a particular condition depends on the circumstances. In Chapman the court clearly was influenced by the fact that El Paso had already spent \$40,000,000 before the Department threatened to withhold the last necessary rights-of-way unless El Paso signed the new stipulations. In this case, if appellants are right that there is extra capacity in the pipeline, it would not appear so burdensome to require FS to operate it as a common carrier.

Rather, our focus in this case is with the kind of analysis offered by the court in Utah Power, supra. We of course recognize that section 505 of FLPMA provides wide latitude for terms and conditions in a right-of-way. It certainly would authorize terms and conditions "necessary or appropriate to carry out the provisions of FLPMA, which include protecting the value of public resources and preventing anti-competitive use of the public lands," as appellants suggest. But BLM is only free to impose terms and conditions that do not conflict with statutory authority delegated to other agencies. In Utah Power the court determined that the Federal Power Act did not grant the FPC jurisdiction over the subject matter governed by the Department's "wheeling" regulation. We cannot make that determination about the ICA and the ICC in this case. 49 U.S.C. § 10501(a) (1988) provides that the ICC "has jurisdiction over transportation * * * by pipeline * * * when transporting a commodity other than water, gas, or oil * * * between a place in * * * a State and a place in another State." And if a carrier is subject to this ICC jurisdiction, it "shall publish and file with the Commission

tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates." 49 U.S.C. § 10762(a)(1) (1988). It is the ICC that has authority to determine the reasonableness of such rates, classifications, rules, and practices. 49 U.S.C. §§ 10701(a), 11701 (1988). Thus, in light of the analysis in Utah Power we would clarify our statement in note 11 of Archer based on Chapman that the manner of the operation of a pipeline as a common carrier is outside the Department's jurisdiction. The Department may condition the operation of a pipeline as a common carrier in ways that are not specifically within the jurisdiction delegated to another agency. In asking that BLM "make specific provisions regarding rates" or in arguing that BLM could "require that pipeline rates be levelized to promote access by competitors" or "was entitled to insist that Chevron accept the condition, for example, of operating the pipeline only under a tariff approved by the BLM," appellants would clearly take BLM beyond its authority because these matters have been delegated to the ICC. What the rates are and whether they are reasonable are within the jurisdiction of the ICC, not this Department.

As noted above, appellants also urged that BLM approve the assignment of the right-of-way on the condition that "the line only be operated while there is in force a tariff of rates approved by the I.C.C.," in effect a suspension of the right-of-way at least until the ICC decision on appellants' June 1992 complaint before the ICC concerning the rates adopted by FS. Ultimately, appellants argued that BLM had grounds to "cancel" the rights-of-way and should have done so and reissued them with conditions to protect competition.

While we may sympathize with appellants' situation, we cannot agree that there is a basis for initiating suspension or termination proceedings. Proceedings, of course, would be required under section 506; BLM could not simply suspend or terminate the rights-of-way unilaterally. Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994); John & Katherine Caton, 126 IBLA 335, 338 (1993). But there must be a basis for instituting the proceedings. Noncompliance with the ICA, even if it were shown to exist, would not serve, for section 506 speaks of noncompliance with any provision of Title V of FLPMA. And we cannot find Chevron's behavior in applying for the rights-of-way as perfidious as appellants do. We do not think it unreasonable to suppose Chevron assumed in 1984 that it would have to file a tariff for its pipeline, said so to BLM and to Archer, then was advised it might fall within what appellants characterize as an obscure exemption and decided it would prefer not to be regulated by the ICC if it did not have to be. As it turned out, it did have to file a tariff. As discussed above, it is up to the ICC to say whether or not that tariff is unreasonable, and it will say so when it decides on Ashley Creek's complaints before it. 8/

Waiting is what galls appellants, but it is not the office of BLM to rescue appellants from the vicissitudes of doing business in the natural

8/ On May 17, 1995, (service date: May 19, 1995), the ICC granted Chevron's motion for extension of time and ordered it to file its surrebuttal by June 20, 1995. Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., Ashley Creek Phosphate Co. v. SF Phosphates Limited Co., No. 40131 (Sub-No. 1), No. 40810. 1995 ICC Lexis 109.

resources industry. It would be a different matter if the ICC had decided no tariff were needed; then BLM would be responsible for deciding whether the pipeline should be operated as a common carrier for any of the reasons we discussed in Archer.

In summary, BLM's October 15, 1992, decision must be modified. BLM Manual § 2801.42F.2.c. does not provide a basis for refusing to impose a common carrier stipulation as a condition of approving an application for an assignment of a right-of-way under 43 CFR 2803.6-3 when, as here, a convincing reason exists for imposing such a stipulation. Further, BLM has authority to condition the operation of a pipeline as a common carrier in ways that are not specifically within the jurisdiction delegated to another agency, but in this case the ICC has jurisdiction to determine the reasonableness of the rates and rules related to those rates governing the operation of the FS pipeline so BLM may not impose such conditions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Will A. Irwin
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

